IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISC. APPLICATION NO. 52 OF 2005.

Dr. Mohan N. Bhawe,
41,Manali Apts.,
Hanuman Cross Rod.,
2, Vile Parle (E),
Mumbai 400 057. ... Applicant.

Versus

1. M/s. Travel Force,
Hede Consultancy Company Ltd.,
Durga Bhawan,
Hede Center, Tonca,
Panaji, Goa.

2. State of Goa,
Through the Public Prosecutor,
Panaji, Goa. ... Respondents.

Shri S. G. Bhobe, Advocate for the Applicant.

Shri S.N. Sardessai, Public Prosecutor for the State/Respondent No.2.

CORAM: N. A. BRITTO, J.

DATE: 6th APRIL, 2005.

ORAL ORDER:

Heard Shri S.G. Bhobe, the learned counsel on behalf of the petitioner/applicant who is an accused in C.C. No. 539/OA/2000/C and against whom process has been issued under Section 138 of the Negotiable Instruments Act, 1881 and who having filed an application dated 24.2.04 for recall of the said process, the said application has been dismissed by the

learned trial Court relying upon the case of ***Adalat Prasad v. Rooplal Jindal (2004 (4) Mh.L.J. 274)***.

2. The applicant has now invoked the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (Code, for short) and Article 227 of the Constitution of India.

3. The question before the Court is whether the applicant/accused should be allowed to invoke the extraordinary jurisdiction of this Court when ordinary remedy of revision is available to the applicant ?

4. The petition has been filed to set aside the said order issuing process against the accused under S.138 of the Negotiable Instruments Act, 1881 on the ground that the complaint filed against the accused and the documents produced along with the said complaint as well as the verification statement taken at their face value did not make out a prima facie case, for issuing process against the said accused.

5. The extraordinary jurisdiction of this Court under the said S.482 of the Code and Art.227 of the Constitution has been invoked, as per learned Advocate Shri Bhobe, relying on the said case of Adalat Prasad v. Rooplal (supra) wherein the Hon'ble Court made a casual observation

that the only remedy available to an aggrieved accused to challenge the order in an interlocutory stage is the extraordinary remedy under S.482 of the Code and not by way of application to recall the summons or to seek discharge which is not contemplated in the trial of summons cases and which observation is again found to have been made by the Hon'ble Supreme Court in another case namely ***Subramanium Sethuraman v. State of Maharashtra and another (2004 A.I.R. SCW 5326).***

6. In my humble opinion, the said casual observations of the Hon'ble Supreme Court in the aforesaid two cases cannot be considered to be the law laid down by the Hon'ble Supreme Court. In fact, in both the said cases what the Hon'ble Supreme Court was considering was whether once process was issued against an accused, the Magistrate had jurisdiction to review or to re-consider the decision to issue process in the absence of any specific provision for recalling such order under the Code. In other words, the Hon'ble Supreme Court in the said two cases was essentially considering the power of the trial Court to recall an order once it was made to issue process against an accused.

7. Section 397 of the Code gives power to the High Court or to the Court of Sessions to call for and examine the record of any proceeding before any inferior criminal court for the purpose of satisfying itself as to

the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceedings of such inferior Court. S.482 of the Code saves inherent powers of the High Court and provides that nothing in the Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. In the case of ***Raj Kapoor and others v. State and others*** [***(1980) 1 S.C.C. 43]*** the Hon'ble Supreme Court had stated that availability of revisional jurisdiction under S.397 of the Code does not exclude the jurisdiction under S.482 of the Code and that the Court should exercise its inherent jurisdiction only in extraordinary situations.

8. In my view there is no extraordinary situation or any exceptional case being made out on behalf of the accused for the accused to invoke and for this Court to exercise extraordinary jurisdiction either under S.482 of the Code or Art. 227 of the Constitution. In my view, for a party against whom process has been issued by a criminal Court a twofold remedy is now available. One could be termed as ordinary remedy under S.397 of the Code and the other could be termed to be an extraordinary remedy under S.482 of the Code. This is evident from a reading of Section 397 as well as Section 482 of the Code and the pronouncements of the Hon'ble

Supreme Court in a catena of decisions. Some of the decisions have been taken note of by the Hon'ble Supreme Court in paragraph 2 in the case of ***S.K. Bhatt v. State of U.P. (2005 A.I.R. SCW 1435).*** I may only refer to one of them, namely the case of ***Rajendra Kumar Sitaram Pande and others v. Uttam and another [(1999 (3) S.C.C. 134]*** wherein the Hon'ble Supreme Court has stated that an order directing issuance of process is purely not an interlocutory order and that it could be termed as intermediate and quasi-final and therefore revisional jurisdiction under S.397 could be exercised against the same.

9. In the case of ***State, through Special Cell New Delhi v. Navjot Sabdhu*** [***(2003) 6 S.C.C. 641]*** the Hon'ble Supreme Court has stated that the inherent power under S.482 of the Code overrides other provisions including S.397 of the Code, but the remedy under it is not to be exercised when remedy under the Code or other statute is available. The Court further held that inherent power is to be used only in cases where there is an abuse of process of court or where interference is absolutely necessary for securing the ends of justice and it must be exercised very sparingly as cases which require interference would be few and far between. The most common case where inherent jurisdiction is generally exercised is where criminal proceedings are required to be quashed because they are initiated illegally, vexatiously or without

jurisdiction.

10. In the case of ***Zandu Pharmaceutical Works Ltd. v. Mohd. Sharafal Haque and another [(2005) 1 S.C.C., 122]*** the Hon'ble Supreme Court has again reiterated the principle that the exercise of power under S.482 is an exception and not a rule and that is to be exercised ex debito justitia to do real and substantial justice for which the Court alone exists.

11. In my view since the applicant has a remedy of revision available under S.397 of the Code, this Court need not exercise its jurisdiction either under S.482 of the Code or under Art.227 of the Constitution.

12. Again the revisional jurisdiction has been conferred concurrently on two courts namely the Court of Sessions as well as this Court. As held by me in the case of **Jeetendra R. Deshprabhu v. Laxmikant Yeshwant Parshekar and others (Criminal Revision Application No. 28/04)** decided on 23.12.04 after considering several decisions of this Court, it is the choice of the superior court whether a revision petition should be entertained by it or not by allowing a party to by-pass the inferior court. I ad also observed that it is unwritten law settled by the propriety, practice and prudence that a party ordinarily should approach the Court of Sessions first, in revisional jurisdiction.

13. Considering the nature of the petition filed by the petitioner, I do not consider that this is a fit case to exercise the extraordinary jurisdiction under S.482 of the Code or to exercise the revisional jurisdiction, by by-passing the court of Sessions.

14. The petition/application of the applicant shall therefore be returned to him and he will be at liberty to present the same before the Court of Sessions. In case the petition is presented within a period of 15 days after the same is returned to the applicant, the learned Sessions Judge shall register the same as a revision application against the order issuing process against the accused and dispose of the same as expeditiously as possible, in accordance with law.

N. A. BRITTO, J.

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